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From:

Sent: Monday, April 15, 2013 3:27:16 PM

To:

Cc:

Subject: RE: Interest on underpayment for a barred assessment.

We agree with the conclusions in your original memo and in your email below. Although the Service did not assess the _____ for tax year _____, it can retain the tax payments made by the taxpayer prior to the expiration of the ASER. See Rev. Rul. 85-67, 1985 C.B. 364. However, the Service cannot assess additional interest on the tax liability that was never actually assessed. Section 6601(g) provides that interest prescribed under 6601 on any tax may be assessed and collected at any time during the period within which the tax to which such interest relates may be collected. Under section 6502, where a tax assessment has been made within the requisite period of limitations, the Service may collect the tax by levy or by a proceeding in court, but only if the levy is made or the proceeding begun within 10 years after the assessment of the tax. In this case the Service is barred from assessing the _____ tax and the Service must also be barred from assessing and collecting the related underpayment interest. See Treas. Reg. 301.6601-1(f)(1) (interest "may be assessed and collected at any time within the period of limitation on collection after the assessment of the tax to which it relates"). See also *Gingerich v. United States*, 78 Fed. Cl. 164, 169 n. 4 ("Because the IRS may only collect tax for which a timely assessment is made, see I.R.C. 6502(a), and interest may only be assessed while the associated tax may be collected, see I.R.C. 6601(g), and because the IRS did not timely assess tax here . . ., sections 6502 and 6601 do not provide the government an avenue by which it could have assessed the related interest in these cases).

Finally, we agree that the counsel memo brought to your attention by the revenue agent is not relevant to the issue in this case because it involves the reinstatement of a tax liability after an erroneous abatement, due to a clerical error. No such abatement or clerical error occurred in this case.

If you have questions or would like to discuss, please feel free to contact me.

Thanks,